**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**CRIMINAL APPEAL No. 1507 of 2003**
**With**
**CRIMINAL APPEAL No. 1508 of 2003**
**With**
**CRIMINAL APPEAL No. 1568 of 2003**
**With**
**CRIMINAL APPEAL No. 51 of 2004**
**With**
**CRIMINAL APPEAL No. 52 of 2004**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE ANIL R. DAVE**
**HONOURABLE MR.JUSTICE KS JHAVERI**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**KABHAIBHAI DESHAIBHAI RATHOD - Appellant(s)**
**Versus**
**STATE OF GUJARAT - Opponent(s)**

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**Appearance :**
MS SADHANA SAGAR for Appellant(s) : 1,
MR KT DAVE, ADDL. PUBLIC PROSECUTOR for Opponent(s) : 1,

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**CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE**

**and**

**HONOURABLE MR.JUSTICE KS JHAVERI**

**Date : 24/04/2007**

**ORAL JUDGMENT**

**(Per : HONOURABLE MR.JUSTICE ANIL R. DAVE)**

As common judgment delivered on 28.11.2003 in Sessions Case No. 7/02 decided by the learned Addl. Sessions Judge, Fast Track Court No. 2, Bharuch, has been challenged in the aforesaid 5 appeals, all these appeals have been heard and decided together.

2. Criminal Appeal No. 1507/03 has been filed by accused No. 1, Kabhaibhai Deshaibhai Rathod, Criminal Appeal No. 1508/03 has been filed by accused No. 2 Prakashbhai @ Pako Melabhai Rathod, Criminal Appeal No. 1568/03 has been filed by Ashok Budhabhai Rathod, accused No. 4, Criminal Appeal No. 51/2004 has been filed by accused No. 5 Punjabhai Govindbhai Rathod and accused No. 3 Arjun Prabhatbhai Rathod has filed Criminal Appeal No. 52/2004.

3. By virtue of the impugned judgment and order, all the appellants-accused have been convicted of the offence under sections 376 and 506(2) read with sec. 114 of the Indian Penal Code (for short 'IPC') and each appellant-accused has been sentenced to undergo Rigorous Imprisonment for 10 years and a fine of Rs. 1,000/-, in default of payment of fine, Rigorous Imprisonment for 6 months.

4. So far as offence under sec. 506(2) of the IPC

is concerned, each appellant-accused has been sentenced to undergo 1 year's Rigorous Imprisonment and a fine of Rs. 500/-, in default of payment of fine, Rigorous Imprisonment for 2 months has been imposed. It has been also ordered that both the punishments shall run concurrently and the amount of fine, in all Rs. 5,000/-, shall be paid to the victim.

5. In view of the judgment delivered by the Hon'ble Supreme Court in the case of **State of Karnataka v. Puttaraja**, AIR 2003 SCW 6429, name of the victim has not been stated in this judgment, but she has been referred to as 'the victim.'

6. The case of the prosecution against the appellants-accused was that about 3½ months before 24.9.2001, when the victim was going to answer the call of nature around 2 p.m.,(the date not known to the victim) when she was alone while on a road leading to village Kasva, the accused had taken her on the side of the road and had raped and had given threats to her and thereby they had committed offences punishable under the provisions of sec. 376, 506(2) r/w sec. 114 of the IPC.

7. The victim had filed an FIR at Bharuch Rural Police Station stating that before about 3 months, around 2 p.m., when she was going alone on a road towards village Kasva for answering the call of nature, all the five accused, who had been named in

the FIR, came there and one of them, namely, Kabhaibhai Deshaibhai Rathod, had caught hold of her and had taken her on the side of the road; her clothes had been removed and she had been raped by him and thereafter all the remaining accused, namely, Prakashbhai @ Pako Melabhai Rathod (accused No. 2), Arjun Pratapbhai Rathod (accused No. 3), Ashok Budhabhai Rathod (accused No. 4) and Punjabhai Govindbhai Rathod (accused No. 5) had also raped her. When the victim resisted, force was used by the accused and she was gang-raped. Thereafter all the accused had given her threat to the effect that if she revealed the fact with regard to the incident to anyone at her residence, they would kill her. Therefore, she did not say the said fact to any of her family members and as if she was sick, for about a week or so, she had remained in the bed. According to the victim, as stated in the FIR, after about one month from the date of the said incident, as she didn't have her routine menstrual cycle and as she had started vomitting, she revealed the entire incident, including the fact with regard to rape, to her mother. Once again, she did not have her menstrual period in the next month and, therefore, her mother had taken her to a midwife, named, Ichhaben Machhi, who told the victim as well as her mother that the victim was having pregnancy of about 2½ months. Thereafter there were some riots at village Bhadbhut and on the third day after the said riots, the victim had gone to the police station, but as the police personnel were busy with maintaining

law and order situation, they could not be contacted and therefore the victim went back to her residence. On the third day thereafter Thakor Patel of their village had visited them and had told mother of the victim that they should compromise the case and they would be paid the amount of expenditure incurred by them for her medical treatment. They were further told that in the event of filing a police case, they will have to very often go to the court and, therefore, her mother had shown her willingness for a compromise, but till 24.9.2001, the victim and her mother had not been paid the expenditure incurred by them towards medical treatment, and as the accused had not contacted the victim or her mother so as to compromise the whole issue, the victim had gone to the police station for giving the FIR. The said FIR had been registered as C.R. No. I-138/01.

8. Though it is a case wherein the FIR had been filed by the victim herself after about 3 months from the date on which the offence had been committed, it is strange that the victim turned hostile when she was examined on oath before the court for giving her evidence. Kalidas Mangalbhai, maternal uncle of the victim, PW No. 11 (Exh. 45) had also turned hostile.

9. As the FIR had been filed 3 months after the date of commission of the offence, no medical evidence against the accused could be found. However, Dr. Ashok Gupta, PW No. 13 (Exh. 58), who had examined the victim, has stated in his chief that

upon examination of the victim he had found that hymen of the victim had been ruptured and she was having pregnancy of approximately 16 weeks old. It was reported by the said doctor that the victim had no intercourse in last 72 hrs. of her examination. Before examination of the victim, the said witness had recorded by way of case history of the victim that before about 2½ months, around 2 p.m., when the victim was going out of the village to answer the call of nature, she had been raped by the five accused. The victim had named all the accused before the said witness, Dr. Ashok Gupta, PW No. 13 (Exh. 58).

10. On the basis of the evidence of the victim and upon considering the medical evidence of Dr. Ashok Gupta, PW No. 13 (Ex. 58), the Sessions Court found the accused to be guilty of the offences charged against them and passed an order imposing sentence and fine upon them as aforesaid.

11. In the course of the trial, the prosecution had examined the following witnesses:

(1)Laljibhai Rathod, who had accompanied the victim to the police station, PW No. 9 (Exh. 37)
(2)Kalidas Mangalbhai, maternal uncle of the victim, PW No. 11 (Exh. 45)
(3)Savitaben Madhubhai, mother of the victim, PW No. 14 (Exh. 71)
(4)The victim, PW No. 15 (Exh. 72)

(5)Dr. Rina Parikh, Radiologist, PW No. 10 (Exh. 38)
(6)Dr. Rina Makwana, Medical Officer, who had examined the accused, PW No. 12 (Exh. 46)
(7)Dr. Ashok Gupta, the Medical Officer, who examined the victim, PW No. 13 (Exh. 58)
(8)Jabbarbhai Jalu, PSI and Investigating Officer, PW No. 16 (Exh. 75)
(9)Manilal Mansukhbhai, Head Constable and PSO, PW No. 17 (Exh. 80)

The following important documentary evidence was produced before the court:

(1)Panchnama of the place of incident (Exh. 13)
(2)Panchnama of the clothes of the victim (Exh. 20)
(3)Panchnama of clothes of accused Nos. 1-3 (Exh. 22)
(4)Panchnama of body of the accused (Exh. 30)
(5)Certificate with regard to age of the accused (Exhs. 39-43)
(6)Certificate of the Dr. with regard to examination of the accused (Exh. 48-52)
(7)Certificate regarding examination of the victim (Exh. 16)
(8)FIR (Exh. 73)
(9)FSL Report (Exh. 78)
(10)Serological Report (Exh. 79)

12. Learned advocate Ms. Sadhna Sagar appearing for all the accused has submitted that the order of

conviction passed by the learned Addl. Sessions Judge is patently bad for the reason that there was no eye witness to the incident and even the victim had turned hostile. In view of absence of any DNA test and any other corroborative evidence, according to her, the learned Addl. Sessions Judge ought not to have convicted the accused. It has been thereafter submitted by her that in fact the FIR had been filed by the mother, Savitaben, PW No. 14 (Exh. 71) of the victim and not by the victim though thumb-mark was put by the victim below the FIR. She has stated that the entire version with regard to the incident had been given by the mother of the victim, Savitaben, PW No. 14 (Exh. 71). She has thereafter submitted that all panch witnesses had turned hostile and therefore there was no reliable evidence with regard to the scene of offence. Lastly she has submitted that the FIR had been filed after about 3 months of the incident and the said delay should be treated as fatal to the case of the prosecution because the said delay has not been properly explained either by the victim or by her mother, Savitaben, PW No. 14 (Exh. 71).

13. It has been submitted by the learned advocate appearing for the accused that in a case of rape delay caused in filing the FIR by the victim or by someone on her behalf is absolutely fatal to the case for the reason that in such a case there is no medical evidence to substantiate the case of the prosecution. According to her, in the instant case,

as per the version of the victim, she remained in bed for about one week after she was raped and she reported the fact with regard to rape to her mother only after she missed her menstrual cycle. Even thereafter for about a month nothing was done, but upon missing the second menstrual cycle, the victim and her mother had contacted a local mid-wife, Ichhaben Machhi. Even thereafter they waited to see whether there was any proposal with regard to compromise from the accused.

14. She has further submitted that the entire story put up by the victim lacks credibility in view of the fact that there was substantial delay in filing the FIR and particularly in view of the fact that the victim had turned hostile. According to her, if in fact the victim had been raped, she would not have turned hostile.

15. According to the learned advocate, it is nothing but a plot hatched to extract money from the accused by the victim and her mother because brother of the victim, Ramesh, and maternal uncle of the victim, Kalidas Mangalbhai, PW No. 11 (Exh. 45) had some dispute with the accused in the past.

16. In the circumstances, she has submitted that there is no case made out against the accused and as the prosecution has failed to establish its case beyond reasonable doubt, the impugned order of conviction and sentence deserves to be quashed and

set aside and the accused should be set free.

17. On the other hand, learned APP Shri KT Dave has vehemently argued in support of the impugned judgment and has submitted that even if there is no medical evidence, bare statement of the victim before medical officer, Dr. Ashok Gupta, PW No. 13 (Exh. 58) as well as the averments made in the FIR are sufficient to hold the accused guilty of the charges levelled against them. It has been forcefully submitted by him that in our kind of society, normally, no woman would ever level false allegations against someone at the cost of her own prestige or dignity. For alleging something against the accused, the victim was putting her reputation at stake and, therefore, the order of conviction on the basis of victim's testimony and evidence is just, legal and proper.

18. We have heard the learned advocates at length and have carefully gone through the evidence adduced before the Sessions Court.

19. Upon perusal of the evidence and looking to the facts of the case, the first doubt which has been raised in our mind is with regard to the reason for which the delay had been caused in filing the FIR. The victim is unable to give exact date when the incident had taken place. We do not consider this to be very significant for the reason that the victim is an illiterate girl; she may not have correct idea of the date or day, but we fail to understand as to why

she or her mother did not file the FIR immediately after the offence took place, that is, after the victim was raped. We do not find any justifiable reason for the victim not to report the said incident even to her mother and even assuming that there was a justifiable reason for not reporting to the mother, at least upon missing the first menstrual cycle when the mother Savitaben, PW No. 14 (Exh. 71) had been informed by the victim, prompt action ought to have been taken by them to report the matter to the police.

20. Instead of filing an FIR, it is strange that the victim and her mother contacted local mid-wife Ichhaben Machhi and even upon knowing that the victim was about 2½ months pregnant, nothing was done for filing the FIR by the victim or her mother. Instead, they waited for someone to come with a proposal for compromise and for getting money from the accused. This behaviour of the victim and her mother appears to be absolutely strange more particularly in view of the fact that in a statement made under sec. 313 of the Cr.P.C. by the accused, there is a specific averment to the effect that the accused had strained relations with Ramesh, brother of the victim and maternal uncle of the victim. According to the accused, as stated in the statement recorded under sec. 313 of the Cr.P.C., only because of the animosity which they had with Ramesh and the maternal uncle of the victim, false allegations had been levelled against the accused.

21. Only on the basis of the statement made by the victim before the police authority as reflected in the FIR and the statement made before Dr. Ashok Gupta, PW No. 3 (Exh 58) and looking to the circumstances leading to compromise among the parties, the learned Addl. Sessions Judge has found the accused to be guilty of the offences charged against them. In our opinion, however, it would be unsafe to convict the accused on the basis of statement made by the victim before the police authorities in the FIR, which had been refuted by the victim herself while giving her evidence before the court. True, evidence of the victim need not have any corroborative material and there are cases and cases where accused have been convicted only on the basis of evidence given by the victim.

22. The facts and circumstances of the instant case are however somewhat different. The victim herself has turned hostile. She, PW No. 15 (Exh. 72) has stated in her evidence that she did not recognize the persons, who had committed the rape. There is no corroborative medical evidence simply because the victim had been examined after about 3 months and even the accused had been examined after about 3 months from the date on which the alleged offence had been committed. In absence of any medical evidence and in view of the victim herself becoming hostile to her own case, in our opinion, it would be difficult for this court to agree with the findings of the

learned Addl. Sessions judge and to hold the accused to be guilty of the charges levelled against them. In our view, the crucial factors which are against the prosecution are (1)delay caused in filing the FIR, (2) the victim turning hostile to her own case, (3) the averments made with regard to compromise especially in view of the fact that the brother and the maternal uncle of the victim had old disputes with the accused.

23. Though it has not been highlighted much by the prosecution, it appears from the suggestion made in the cross-examination of Savitaben, PW No. 14 (Exh. 71) that the victim had physical relation with a person named Bharat Raisangh belonging to her village. That can be an additional factor which would weigh against the prosecution. Looking to the aforesaid facts and more particularly in absence of any medical evidence incriminating the accused and in absence of any DNA test carried out by the prosecution so as to prove involvement of the accused, in our opinion, it would not be safe to convict the accused merely on the basis of the inadequate evidence adduced on behalf of the prosecution. Neither the version of the victim nor that of her mother, Savitaben, PW No. 14 (Exh. 71)inspires any confidence and more particularly when the victim has stated in her examination, while replying to the queries put by the court, that there was a compromise between the victim's family and the accused.

24. In the aforesaid circumstances, in our opinion, the judgment and order passed by the learned Addl. Sessions Judge cannot be sustained and it deserves to be quashed and set aside.

25. In the result, each appeal is allowed. The judgment and order dated 28.11.2003 passed by the learned Addl. Sessions Judge, Fast Track Court No. 2, Bharuch, in Sessions Case No. 7 of 2002 is quashed and set aside. The appellant-accused in each case, namely, Kabhaibhai Deshaibhai Rathod, appellant in Criminal Appeal No. 1507 of 2003, Prakashbhai @ Pako Melabhai Rathod, appellant in Criminal Appeal No. 1508 of 2003, Ashok Budhabhai Rathod, appellant in Criminal Appeal No.1568 of 2003, Punjabhai Govindbhai Rathod, appellant in Criminal Appeal No. 51 of 2004 and Arjun Prabhatbhai Rathod, appellant in Criminal Appeal No. 52 of 2004 are ordered to be set at liberty forthwith if they are not required in connection with any other criminal case. The amount of fine, if paid by the appellants-accused, shall be refunded to them.

(Anil R. Dave, J.)

(K.S. Jhaveri, J.)

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